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Kathleen B. Levitz
Vice President-Federal Regulatory

January 20, 1998

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EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

RECEIVED

JAN 20 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket No. 95-116

Dear Ms. Salas:

Today Ernest Bush and the undersigned met with Kevin Martin, Legal Advisor to Commissioner Harold Furchtgott-Roth to present BellSouth's position on issues related to the recovery of costs incurred to implement local number portability. Two of the attached documents, each labeled "Cost Recovery for Local Number Portability," formed the basis for that presentation. I am also attaching a copy of an earlier written BellSouth ex parte presentation filed with the Secretary's Office on August 5, 1997, that sets forth BellSouth's analysis of the jurisdictional issues regarding number portability cost recovery. We are sharing this document with Mr. Martin at his request.

Please include a copy of this letter and the attachments in the record in this proceeding.

Two copies of this notice are filed in accordance with Section 1.1206(a) of the Commission's rules.

Sincerely,

Kathleen B. Levitz

Kathleen B. Levitz
Vice President - Federal Regulatory Affairs

Attachments:

cc: Kevin Martin

No. of Copies rec'd
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Cost Recovery for Local Number Portability

1/20/98

Bell South

1

Principles of Competitive Neutrality

- Any cost recovery mechanism should not have a disparate effect on the ability of competing service providers to earn normal returns on their investment (CC Docket 95-116, *First Report & Order*, Para. 135)
- A competitively neutral cost recovery mechanism should not give one service provider an appreciable incremental cost advantage over another service provider when competing for a specific subscriber. (CC Docket 95-116, *First Report & Order*, Para. 132)

- **A COST RECOVERY SOLUTION THAT REQUIRES EACH CARRIER TO BEAR ITS OWN COSTS IS NOT COMPETITIVELY NEUTRAL**

Principles of Competitive Neutrality

- The Commission should strive to ensure market-neutral decision, especially between carriers operating in the same markets (AT&T in CC Docket No. 97-213, 12/12/97)
- Costs also may fall disproportionately on certain companies -- wireline and wireless-- and affect their competitive decision.” (AT&T in CC Docket No. 97-213, 12.12.97)

FCC's Role in LNP Cost Recovery

- The Commission has an unambiguous congressional mandate to ensure that the costs of LNP are borne by all carriers on a competitively neutral basis.
 - The costs of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission. (Section 251(e)(2) of the '96 Act)

FCC's Role in LNP Cost Recovery

- The Commission may clearly prescribe federal number portability cost recovery guidelines to states to the extent they do not intrude upon a state's intrastate ratemaking authority.
 - Section 251(e)(2) provides authority for Commission to adopt guidelines applicable to all local number portability costs
 - Iowa Utilities Board states that no provision of the Act unambiguously requires state rates to comply with FCC prescribed requirements.

Cost Recovery for Local Number Portability

BellSouth

Long Term Number Portability Facts & Principles

- LNP is a new call processing paradigm which results in a new architecture for call completion that requires:
 - Capacity requirements (e.g. switch processors, SS7 links, LNP SCPs)
 - Intelligence to complete call (e.g. switch software, AIN software development)
 - Ability to exchange data between networks (e.g. Number Portability Administration Centers (NPACs), SMS, provisioning & repair gateway)
 - *Fundamental* changes to existing administrative/support systems (e.g. Billing, provisioning, ordering and maintenance)
- Costs of installing & administering regional databases / NPACs (Type I)***plus*** each carrier's direct costs (Type II) are the total costs to implement LNP.
 - LNP requires both Type I & Type II costs to be successful;
 - Bulk of costs associated with number portability are ILEC's Type II costs;
 - There is no reason to distinguish Type I costs and Type II costs for cost recovery purposes;
- "N-1" carriers are responsible for ensuring that databases are queried, as necessary
(para 73, Second Report & Order in CC Docket 95-116)

BellSouth's Initial LNP Cost Recovery Position

- Initially, BellSouth supported SBC's original cost recovery proposal for LNP:
 - Allocation of costs based on "elemental access lines" (EAL)
 - National fund based on mandatory, temporary, uniform "EAL" surcharge
- Alternatively, BellSouth supports a cost recovery mechanism similar to FCC's recommendation on Universal Service.
 - Type I & Type II costs reported to a national administrator and amortized over a 3-5 year period;
 - The nationwide costs for LNP split into two components: an interstate portion and an intrastate portion--similar to Universal Service;

BellSouth's Alternative LNP Cost Recovery Position

- Type I & Type II costs reported to a national administrator and amortized over a 3-5 year period;
- The nationwide costs for LNP split into two components: an interstate portion and an intrastate portion--similar to Universal Service;
- Carriers funding to the interstate costs based on their percentage of nationwide interstate revenues.
- Carriers funding to the intrastate costs based on their percentage of nationwide intrastate retail revenues.
- Interstate assessment would be given exogenous treatment and recovered through charges to carriers in the interstate jurisdiction.
- The intrastate portion of costs would be recovered from the state jurisdiction;
- After the amortization period has expired, any LNP charges would be eliminated.
- Carriers will be allowed to assess other carriers a per query charge for default queries.

FCC Guidelines to States on LNP Cost Recovery

- FCC should clearly define “competitively neutral” and indicate that all telecommunications carriers should participate in LNP cost recovery;
- FCC should clearly specify which costs are eligible to be included as Type I & Type II costs;
- States should be given adequate latitude to develop the precise cost recovery mechanisms for carriers under their jurisdiction;
 - Cost recovery for CMRS carriers should remain at interstate level;
- FCC should specify that intrastate LNP costs qualify for exogenous treatment;

FCC Guidelines to States on LNP Cost Recovery (Cont):

- FCC should specify that for states with Phase I & Phase II MSAs (*For example, in BellSouth's region: Florida & Georgia*), a cost recovery mechanism should be in place by 6/30/98.
 - Remaining states should have cost recovery mechanism in place prior to the start date of the quarter when state's initial MSA is scheduled for LNP.
- FCC should clearly specify that LNP cost recovery should be viewed as temporary and fully recoverable over a 3-5 year time period.

Summary

- Cost recovery solution must be competitively neutral;
 - Each carrier bearing its own costs is not competitively neutral;
- Cost recovery solution must include Type I & Type II costs;
- National fund based on mandatory, temporary, uniform “EAL” surcharge still most competitively neutral;
- Cost recovery based on Universal Service Model is also competitively neutral:
 - FCC must give guidelines to states for cost recovery of intrastate portion;

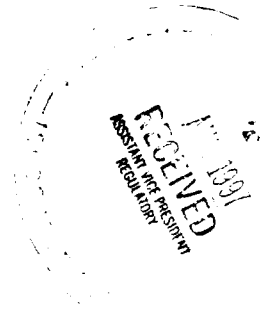
Cynthia K. Cox
Executive Director-
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August 5, 1997

EX PARTE

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, D.C. 20554



Re: CC Docket 95-116, Number Portability

Dear Mr. Caton:

Today, BellSouth sent the attached letter to Mr. Richard Metzger, Mr. Neil Fried, Mr. Len Smith, Mr. Glenn Reynolds and Mr. Steven Teplitz of the Common Carrier Bureau, Mr. Tom Boasberg in Chairman Hundt's office, Mr. Jim Casserly in Commissioner Ness's office, Ms. Kathleen Franco in Commissioner Chong's office and Mr. Paul Gallant in Commissioner Quello's office.

Please include a copy of this letter and the attachment in the record in this proceeding.

In accordance with Commission rules, the original of this letter and one copy are being filed with your office. Acknowledgment and date of receipt are requested. A duplicate of this letter is included for this purpose.

Sincerely,

A handwritten signature in cursive script, reading "Cynthia K. Cox", is written over the typed name.

cc: Richard Metzger (w/o attachment)
Neil Fried (w/o attachment)
Len Smith (w/o attachment)
Glenn Reynolds (w/o attachment)
Steven Teplitz (w/o attachment)
Tom Boasberg (w/o attachment)
Jim Casserly (w/o attachment)
Kathleen Franco (w/o attachment)
Paul Gallant (w/o attachment)

Robert T. Blau, Ph.D, CFA
Vice President - Executive and
Federal Regulatory Affairs

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August 5, 1997

Mr. A. Richard Metzger, Jr.
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

RE: CC Docket 95-116, Number Portability

Dear Mr. Metzger:

During our ex parte meeting on Friday, July 25, 1997, BellSouth discussed alternative proposals for number portability cost recovery. During the course of that discussion we agreed to provide a more thorough analysis of the jurisdictional issues regarding number portability cost recovery that resulted from the recent 8th Circuit court decision on the Commission's local interconnection Order.

To summarize BellSouth's alternative cost recovery proposal for number portability, we propose that all Type I and Type II costs be included in a national fund. Such a fund, in our view, is necessary to meet the mandate of the Telecommunications Act of 1996 for competitive neutrality. The national fund would be split into interstate and intrastate components with each allocated based on the relevant retail revenues. The interstate portion of the allocated costs would be given exogenous treatment and recovered accordingly. The intrastate portion of the allocated costs would be recovered from intrastate services. We further believe the FCC should articulate guidelines for intrastate treatment of number portability cost recovery. At a minimum these guidelines should specify:

- the definition of "competitive neutrality" including clarification that all carriers should participate in number portability cost recovery;
- which costs are eligible to be included as Type I and Type II costs;
- that intrastate costs qualify for exogenous treatment;
- that states with Phase I and Phase II MSAs should have a cost recovery plan in place by 6/30/98; remaining states must have plan in place prior to deployment; and,
- number portability costs should be fully recovered over a 3-5 year time period.

As explained in the attached paper, BellSouth does not believe the recent 8th Circuit court decision would preclude the Commission from implementing or enforcing state compliance with such guidelines.

Feel free to call me with any questions on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Blair". The signature is fluid and cursive, with the first name "Bob" and last name "Blair" clearly distinguishable.

cc: Neil Fried
Glenn Reynolds
Len Smith
Steven Teplitz
Tom Boasberg
Jim Casserly
Kathleen Franco
Paul Gallant

COST RECOVERY FOR NUMBER PORTABILITY

After

Iowa Utilities Board v. F.C.C., ___ F.3d ___ (No. 96-3321, 8th Cir. July 18, 1997)

Question Presented

1. In light of the Eighth Circuit's recent decision regarding jurisdiction over pricing for interconnection, can the FCC prescribe guidelines that should be followed by the States in order to ensure competitively neutral cost recovery for long term number portability?

Answer

Yes. The FCC has jurisdiction to prescribe general guidelines to ensure that the costs of number portability are borne by all carriers on a competitively neutral basis. Such guidelines should not intrude upon a State's ability to set rates for intrastate services.

Analysis

I. THE COMMISSION HAS AN UNAMBIGUOUS CONGRESSIONAL MANDATE TO ENSURE THAT THE COSTS OF LNP ARE BORNE BY ALL CARRIERS ON A COMPETITIVELY NEUTRAL BASIS.

A. The 1996 Act.

The Telecommunications Act of 1996¹ provides that the cost of establishing number portability "shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."² Thus, the Commission must determine that all the costs of establishing number portability under section 251(b)(2) of the 1996

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

² 47 U.S.C. § 251(e)(2). Number portability is an obligation imposed by the 1996 Act upon all local exchange carriers (LECs). 47 U.S.C. § 251(b)(2).

Act are borne by all telecommunications carriers. The Commission must then determine that this cost bearing is accomplished on a competitively neutral basis.

B. Number Portability Order

On June 27, 1996, the FCC adopted its First Report and Order and Further Notice of Proposed Rulemaking in which it established performance criteria and an implementation schedule for long-term number portability (LNP) pursuant to section 251(b)(2), and adopted a further notice of proposed rulemaking regarding cost recovery for LNP pursuant to section 251(e)(2).³ It also determined that current technically feasible methods of providing number portability, such as remote call forwarding (RCF) and direct inward dialing (DID) satisfy the definition of number portability set forth in the 1996 Act.⁴ Accordingly, the Commission required LECs to provide such “currently available number portability methods,” in accordance with section 251(b), prior to the implementation of LNP.⁵

The Commission determined that its authority to prescribe pricing principles for number portability under section 251(e)(2) is independent of any general authority that may be granted by § 251 over pricing for interconnection.⁶

³ Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996)(First Report and Order), First Memorandum Opinion and Order on Reconsideration, FCC 97-74, CC Docket No. 95-116 (Mar. 11, 1997).

⁴ 11 FCC Rcd 8409 -10, ¶¶ 110 -111.

⁵ The Commission determined that, in addition to section 251(b)(2), it had the jurisdiction to require LEC provision of currently available number portability methods independent of the 1996 Act. Id. at 8410-11, ¶ 112.

⁶ The Commission argued before the Eighth Circuit that this authority derived from sections 251(d)(1) and 251(c) of the 1996 Act, and several general rulemaking provisions

126. In our interconnection proceeding, we have sought comment on our tentative conclusion that the 1996 Act authorizes us to set pricing principles to ensure that rates for interconnection, unbundled network elements, and collocation are just, reasonable, and nondiscriminatory. We need not, however, reach in this proceeding the issue of whether section 251 generally gives us authority for pricing for interconnection because the statute sets forth the standard for the recovery of number portability costs and grants the Commission the express authority to implement this standard. Specifically, section 251(e)(2) requires that the costs of “number portability be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.” We therefore conclude that section 251(e)(2) gives us specific authority to prescribe pricing principles that ensure that the costs of number portability are allocated on a “competitively neutral” basis.⁷

The Commission concluded that the 1996 Act gave it the authority to adopt federal pricing guidelines that states must follow in mandating cost recovery mechanisms for currently available number portability methods.⁸

of the Communications Act of 1934. Iowa Utilities Board v. FCC, ___ F.3d ___, (No. 96-3321, Slip Opinion at 102 (“Iowa Utilities Board”).

⁷ Id. at 8417, ¶ 126 (footnotes omitted).

⁸ Id. at ¶ 127. BellSouth maintains that RCF and DID are intrastate local exchange services that do not meet the definition of LNP as set forth in the 1996 Act or Telephone Number Portability; therefore, BellSouth has petitioned the Commission to reconsider its exercise of federal pricing authority under § 251(e)(2) to RCF and DID.

II. THE FCC MAY CLEARLY PRESCRIBE FEDERAL NUMBER PORTABILITY COST RECOVERY GUIDELINES TO THE EXTENT THEY DO NOT INTRUDE UPON A STATE'S INTRASTATE RATEMAKING AUTHORITY.

A. The Iowa Utilities Board Decision.

The United States Court of Appeals for the Eighth Circuit concluded that the Federal Communications Commission does not have jurisdiction to issue pricing rules for interconnection, and accordingly vacated the rules promulgated by the Commission last August.⁹ The FCC, as noted above, previously determined that its authority to prescribe cost recovery pricing principles for number portability exists independently of any authority it may have to set interconnection prices. The Eighth Circuit noted, however, that “no provision of the [Communications Act, as amended by the 1996] Act unambiguously requires rates for the local competition provisions to comply with FCC-prescribed requirements,” while recognizing at the same time that “certain nonpricing provisions of the Telecommunications Act” provide the FCC with “direct and unambiguous grants of intrastate authority”:

For instance, subsection 251(b)(2) burdens LECs with “[t]he duty to provide . . . number portability in accordance with requirements prescribed by the Commission.”¹⁰

The Court went on to hold that while a federal statute’s mere application to intrastate telecommunication matters is insufficient to confer intrastate jurisdiction upon the FCC, a statute’s direct grant of intrastate authority will overcome the operation of section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b).¹¹

⁹ Iowa Utilities Board, ___ F.3d at ___, slip op. at 101.

¹⁰ Id. at 108.

¹¹ Id. at 110.

B. Is section 251(e)(2) a grant of intrastate pricing authority?

It is not entirely clear from the Eighth Circuit's opinion whether it considers Congress's cost recovery mandate contained in section 251(e)(2) to be a direct grant of intrastate authority that unambiguously requires local rates to comply with FCC-prescribed requirements. The Court described the direct grant contained in section 251(b)(2) as a "nonpricing" provision.¹² Although the court generally referred to a number of provisions of the 1996 Act, including section 251(e), in a footnote as "an express call for FCC involvement," the explanatory parenthetical phrase accompanying the citation to section 251(e) is limited to "number administration," the title of the section."¹³ Moreover, section 251(e) "Numbering Administration" contains two subparts, which are never referred to explicitly by the court: subpart (1) entitled "Commission Authority and Jurisdiction," and subpart (2), entitled "Costs."¹⁴

It could be argued that the court's reference to the section 251(e) as a whole necessarily incorporated both of its subsections, including the cost recovery subsection. In that case, the court's general reference to section 251(b)(2) as a "nonpricing" provision would seem to indicate that the Commission's competitive neutrality mandate in subsection (2) is itself a "nonpricing" provision. Coupled with the court's statement that no provision of the Act unambiguously requires rates for the local competition provisions to comply with FCC-prescribed requirements, and its acknowledgment of section 276(b) of the 1996 Act which "directly requires the FCC to establish a compensation plan

¹² Id. at 108

¹³ Id. at n. 10.

¹⁴ 47 U.S.C. § 251(e)(2).

regarding both intrastate and interstate payphone calls,”¹⁵ such a reading would counsel against the FCC’s enacting LNP cost recovery guidelines based on section 251(e)(2) that unduly restrict a state’s ability to set rates.

C. General Federal Guidelines Avoid Jurisdictional Entanglements

The Commission should avoid any jurisdictional disputes over pricing. It can do this by promulgating general guidelines to ensure that the Congressional mandate of section 251(e)(2) is carried out, but structuring these guidelines in such a way that pricing in the intrastate jurisdiction is not unduly affected. The Commission, for example, must avoid the approach it took in establishing federal guidelines for state implementation of cost recovery for interim number portability measures such as RCF and DID. Because these guidelines fundamentally restrict state regulation of local exchange service pricing of intrastate services that do not meet the legal requirements for section 251(b)(2) LNP, (by not allowing any price that is not close to zero) this model runs afoul of Iowa Utilities Board.

Question Presented

1. Is BellSouth’s Alternative LNP Cost Recovery Position consistent with the Communications Act of 1934, as amended by the 1996 Act, the Iowa Utilities Board decision, and the Commission’s own number portability proceedings?

¹⁵ Iowa Utilities Board, ___ F.3d at ___, slip op. at 108, citing Illinois Pub. Telecom. Ass’n v. FCC, No. 96-1394, 1997 U.S. App. LEXIS 16147 (D.C. Cir. July 1, 1997).

Answer

Yes. BellSouth's Alternative LNP Cost Recovery Plan comports with section 251(e)(2) by requiring the FCC to provide, either directly through an initial nationwide assessment or indirectly through the following federal guidelines to be administered by the States, that: (1) the costs of number portability include both Type I and Type II section 251(b)(2) costs; (2) both Type I and Type II costs must be borne by all carriers on a competitively neutral basis; (3) these costs must be treated as exogenous in price cap jurisdictions; and (4) cost recovery mechanisms must be in place by June 30, 1998 for Phase I and Phase II MSA States, and prior to the start of LNP implementation in all other States. The general nature of these guidelines carry out Congress's mandate that the costs of establishing number portability are to be borne by all carriers on a competitively neutral basis and permit State implementation of cost recovery without unduly restricting State regulation of intrastate pricing. Recovery of wireless carrier and interstate wireline carrier LNP costs at the federal level, and recovery of intrastate wireline carrier LNP costs at the State level pursuant to these general federal guidelines comports with both the Communications Act, as amended by the 1996 Act, and the Iowa Utilities Board decision.

Analysis

- I. THE COMMISSION HAS AN UNAMBIGUOUS CONGRESSIONAL MANDATE TO DETERMINE HOW SECTION 251(b)(2) LNP COSTS ARE TO BE BORNE BY ALL CARRIERS ON A COMPETITIVELY NEUTRAL BASIS.

Congress has given the FCC the responsibility for determining that all the costs of establishing number portability are to be borne by all telecommunications carriers.¹⁶

Developing federal guidelines that implement this determination is, in the first instance, clearly within the Agency's scope of regulatory authority. Iowa Utilities Board, slip op. (a statute's direct grant of intrastate authority will overcome the operation of section 2(b) of the Communications Act of 1934).

- A. The Key Elements of the Federal Guidelines Advocated by BellSouth are Essential to Ensuring Compliance with Section 251(e)(2).

A federal requirement that both Type I and Type II section 251(b)(2) costs must be reported to a national administrator and be amortized over a 3-5 year period, and requiring carrier contributions to be based on retail revenues, fulfills Congress's mandate that the Commission ensure that the all the costs of establishing LNP be borne by all carriers on a competitively neutral basis.¹⁷ Both Type I and Type II section 251(b)(2) costs must be borne in order for LNP to work; LNP will not work if only Type I costs are borne. Inclusion of both Type I and Type II costs in any LNP cost recovery mechanism is therefore essential to comply with Congress's mandate in section 251(e)(2) that the

¹⁶ 47 U.S.C. § 251(e)(2).

¹⁷ Id. Type I costs include the costs incurred by the third party administrator to build, operate, and maintain the databases needed to provide LNP. Type II costs are carrier specific costs "directly related" to providing LNP. Telephone Number Portability, 11 FCC Rcd at 8459, ¶ 208.